SIKKIM

GOVERNMENT GAZETTE

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GOVERNMENT OF SIKKIM
ELECTION DEPARTMENT

No.01/2005/ELEC **Dated Gangtok the 7th January,2005.**

Notification No.82/SKM-LA/(1,2,3,/2004)/2004 dated 10th December, 2004 of the Election Commission of India, New Delhi is hereby republished for general information.

ELECTION COMMISSION OF INDIA

NIRVACHAN SADAN,
ASHOKA ROAD,
NEW DELHI-110 001.

Dated: 10th December,2004
19 Agrahayana, 1926 (Saka)

NOTIFICATION

No. 82/SKM-LA/(1,2,3/2004)/2004: In pursuance of Section 106 of the Representation of the People Act, 1951 (43 of 1951), the Election Commission hereby publishes the common order dated 18.11.2004 of the Sikkim High Court in Election Petition Nos. 1,2 and 3 of 2004,

By order,

(R.K.SRIVASTAVA)
SECRETARY

THE HIGH COURT OF SIKKIM: GANGTOK

In the matter of petitions filed under section 81(1) of the Representation of the People Act 1951

and

in the matter

ELECTION PETITION NO. 1 OF 2004

Taraman Chettri,
s/o Late Man Bahadur Chettri,
r/o Melli Bazar,
P.O. & P.S. Melli,
South Sikkim. ... Petitioner

VERSUS

Girish Chandra Rai,
s / o late Harihar Prasad Rai,
M.L.A., .
14-Melli Constituency. ... Respondent

ELECTION PETITION NO. 2 OF 2004

Amar Yonzone,
s/o Late A. S. Yonzone, Boomtar Block,
P.O. Namchi,
South Sikkim. ... Petitioner

VERSUS

Pawan Kumar Chamling,
s/o Asbahadur Chamling,
r/o Gurpishey,
P.O. & P.S. Namchi
South Sikkim ... Respondent

ELECTION PETITION NO. 3 OF 2004

Youaraj Rai,
s/o Kul Bahadur Rai,
r/o Legship, Hingdam,
South Sikkim ... Petitioner

VERSUS

Chander Bahadur Karki
s/o Bom Bahadur Karki,
M.L.A. Hostel, Gangtok,
East Sikkim ... Respondent

For the petitioners: Measrs R. N Mittal, Senior Advocate, M. Z. Ahmed and D. K. Singh, Advocates.

For the respondents: Messrs Niloy Dutta and S.P. Wangdi,Senior Advocates, J.B. Pradhan, Karma Thinlay, Surajit Bhandari and O. P. Bhandari, Advocates. .

ESENT: THE HON'BLE SHRI JUSTICE R.K. PATRA, CHIEF JUSTICE.

Date of order: 18th *November, 2004.*

ORDER

R.K. PATRA. C.J.

Facts are few in the aforesaid three election petitions presented under section 80 read with section 81(1) of the Representation of the People Act, 1951 (hereinafter referred to as the Act). The point involved is solitary, it being whether the petitions are barred by limitation. As they are alike, they were heard together with the consent of learned counsel for the parties and are thus disposed of by this common order.

2. In Election Petition no.I of 2004, the petitioner calls in question the election of the respondent therein to the Sikkim Legislative Assembly from the 14-Melli Assembly Constituency. In Election Petition no. 2 of 2004 the election of the respondent therein to the Sikkim Legislative Assembly from the 13-Damthang Assembly Constituency is under challange. In Election Petition no.3 of 2004 the election of the respondent therein from the 12-Wak Assembly constituency is under question. The petitioner challenge the election of the respondents on the sole ground that their nomination papers were improperly rejected by the Returning Officer.

3. The following was the programme notified by the Election Commission of India for the last general election held for constituting a new Legislative Assembly for the State of Sikkim.

(i)	23.4.2004	-	Last date for making nomination
(ii)	24.4.2004	-	Scrutiny of nominations.
(iii)	26.4.2004	-	Last date for withdrawal of candidatures.
(iv)	10.5.2004	-	Date of poll, if necessary.

On 24.4.2004 the Returning Officer rejected the petitioners' nominations. On 26.4.2004 the Returning Officer declared the respondents elected (uncontested) 17.5.2004 was the date of notification issued by the Election Commission of India in the Official Gazette under section 73 of the Act notifying the names of 32 members elected from 32 different Assembly Constituencies. The election petitions were filed in this court on 25.6.2004.

4. A preliminary issue has been framed in each case with regard to the maintainability of the election petition on the ground of limitation. It reads as follows:-

"Whether the election petition is barred by the law of limitation as prescribed under section 81 of the Act?"

Section 81 (I) of the Act, so far as relevant, reads as follows:-

> "An election petition calling, in question any election may be presented ..... within forty-five days from, but not earlier then the date of election of the returned candidate or if there are more than one returned candidate at the election and dates of their election are different, the later of those two dates."

The contention of Shri Mittal, learned senior counsel for the petitioners is that the reckoning date for computing the period of forty-five days is the date of declaration of results of elections in the Official Gazette as provided under section 73 of the Act which was done on 17.5.2004 and the period of forty-five days began to run only from that date and the election petitions having been presented on 25.6.2004 they are all within time. He also submitted that limitation cannot run prior to the date of declaration of results of elections under section 73 of the Act because the election process can be said to have come to a final halt only on such declaration being made and in view of the bar contained in Article 329(b) of the Constitution of India election petition is not entertainable when the election process is in progress. Shri Dutta, learned senior counsel appearing for the respondents on the other hand relying on the decision of the Supreme Court in Chandrakant Shukla vs. Maharaja Martand Singh AIR 1973 SC 584 submitted that the period of limitation (forty-five days) has to be computed not from the date of declaration of the results of elections but from the date on which the Returning Officer declared the election of the returned candidate. In the instant, cases the Returning Officer declared the respondents elected on 26.4.2004. Therefore the period of forty-five days had to be counted from that date and the election petitions were killed on 25.6.2004 beyond the period of limitation and therefore they are liable to be rejected at the threshold.

5. The moot question that arises for coonsideration is as to the time from which, the period of forty-five days has to be computed.

On close persual of section 81(1) of the Act it would appear that the starting point of limitation (forty-five days) is from the date of election of the returned candidate. In other words, the time from which the period of forty-five days begins to run is the date of election of the returned candidate.

What is the date of election of the returned candidate? Section 67A of the Act answers this question by stating as follows:-

> "(67A. Date of election of candidate.
> For the purposes of this Act, the date on which candidate is declared by the Returning Officer under the provisions of section 53, or section 66, to be elected to a House of Parliament or of the Legislature of a State shall be the date of election of that candidate." (emphasis supplied)

The point as to from which date the period of forty-five days has to be computed for presenting an election petition came up for decision before the Supreme Court in Chandrakant Shukla (supra). Interpreting sections 81 (1) and 67A of the Act the Supreme Court held that the period of forty-five

days begins to run from the date of election of the returned candidate as declared by the Returning Officer and not from the date of publication of election results in the Official Gazette. In that case the respondent was declared elected on 10.3.1971 by the Returning Officer and the election results were published in the Official Gazette on 15.3.1971 but the election petition was filed on 29.4.1971 which was beyond time computing the period of forty-five days from the date the Returning Officer declared the respondents elected. Accordingly the Court held that the election petition was hit by limitation because the period of forty-five days had to be counted, from the date the respondent was declared elected i.e. 10.3.1971 and not from the date the election results were published in the Official Gazette i.e. on 15.3.1971. In this regard, the learned counsel for the respondents has also referred to the decisions of Madhya Pradesh High Court and Calcutta High Court in Abhimanyu Rath vs. Virendra Pandey AIR 1978 Madhya Pradesh 112 and Bhakti Bh. Mondal vs. Khagendra K. Bandopadhya AIR 1968 Calcutta 69. He has also fairly brought to my notice that the decision of the Calcutta High Court (supra) relating to applicability of section 5 of the Limitation Act for the purpose of filing an election petition was not approved by the Supreme Court in Anwari Basavarj Patil vs Siddaramaiah AIR 1994 SC 512 but the ratio that election petition is required to be filed within forty five days from the date on which the Returning Officer declares the candidate elected was not interfered with.

In view of what has been stated above, I have no hesitation to hold that the period or forty five days for presenting an election petition begins to run from the date of election of the returned candidate as declared by the Returning Officer and not from the date of publication of results of general elections in the Official Gazette under section 73 of the Act.

6. My above conclusion is fortified if one looks at the following legislative history relating to election laws. Section 67 A came to be inserted by Act 27 of 1956. In the principal Act prior to insertion of section 67A, section 81(1) dealing with presentation of election petitions was as hereunder:-

> "An election petition calling in question any election may be presented ..... in such form and within such time but not earlier than the date of publication of the name or names of the returned candidate or candidates at such election under section 67, as may be prescribed."

Section 67 of the principal Act was as follows:-

> "As soon may be after the result of an election has been declared, the Returning Officer shall report the result to the appropriate authority and ..... the appropriate authority shall cause to be published in the Offical Gazette the declarations containing the names of the elected candidates."

On conjoint reading of sections 81(1) and 67 of the principal Act extracted above and in absence of any such provision like 67 A of the Act, it is evident that the period of limitation for filing an election petition was to commence from the date of publication in the Official Gazette the declarations containing the names of the elected candidates. Consequent upon the insertion of section 67 A into the principal Act the position is however changed and the prescribed period of limitation for presenting an election petition runs from the date on which the Returning Officer declares the candidate elected and not from the date of notification published by the Election Commission in the Official Gazette containing the names of the elected candidates.

May it be stated here that the notification published in the Official Gazette under section 73 of the Act declaring the results of general election cannot be considered for the purpose of computing the period of limitation. Publication of such notification is only to hold that the House of the People (Lok Sabha) or the concerned State Assembly has been duly constituted. This is crystal clear from the following words occurring in the last sentence of section 73 of the Act which reads "and upon the issue of such notification that House or Assembly shall be deemed to be duly constituted". The notification issued in the present cases under section 73 of the Act (annexure p/3) is for the purpose of holding that the Sikkim State Assembly has been duly constituted with the elected members maintained therein from different Assembly constituencies.

It may not be out of place to note here that section 73 of the Act deals with publication of results of general elections to the House of People (Lok Sabha) and the State Legislative Assemblies whereas sections 71 and 74 deal respectively with publication of results of elections to the Council of States (Rajya Sabha) and State Legislative Councils.

7. I may now turn to the facts of the cases at hand.There is no dispute that the Returning Officer on 26.4.2004 declared 'the respondents elected to fill the seats in the State Legislative Assembly from their respective Assembly constituencies in Form 21 prescribed under Rule 11 (1) of the Conduct of Election Rules, 1961 (vide annexure RI to the preliminary objection of the respondent). In view of the legal position adumbrated above, I unhesitatingly hold that the time to present the election petition began to run from 26.4.2004 and the period of limitation (forty-five days) expired on 10.6.2004 but the election petitions having been fired beyond the time i.e. on 25.6.2004, they are all hit by limitation.

8. The controversy however does not end here. Shri Mittal's further contention is that if the petitioners' interpretation regarding starting point of limitation is accepted, the later part of section 81(1) of the Act would become otiose and the provision of a statute should be read in such a manner so as to give effect to all the words occurring therein.According to the learned counsel, in order to maintain uniformity one reckoning date i.e. the date of publication of the results in the Official Gazette under section 73 of the Act should be taken as the base for counting the period of limitation. He elucidated by stating that in the last election held in the State of Sikkim polling took place in certain constituencies and the dates of election of returned candidates in those constituencies were different from those who were earlier declared elected uncontested like the respondents and the law never contemplates that there should be two dates for computing the period of limitation, one for those candidates who were declared elected without any contest and those candidates who were declared elected at a later stage after counting of votes was completed. Therefore one date should be taken to cover both types of cases for starting the period of limitation. He submitted that which is why the later part of section 81 (1) i.e "if dates of their election are different the later of those two dates-" has been enacted. Shri Dutta, learned counsel for the respondents contra submitted that the Act deals with conduct of elections of both the Houses of Parliament and to the House or Houses of the Legislature of each State.By referring to different provisions of the Constitution of India as well as the Act and the Rules framed thereunder, he submitted that in our country there are two different modes of election systems, one is proportional representation by means of the single transferable vote (i.e. election to the Council of States (Rajya Sabha) and election of members to the Legislative Council of the States) and the second is by direct election (i.e. election to the House of People (Lok Sabha) and the Legislative Assemblies). Therefore, to meet the cases coming under the first system the later part of section

81(1) has been enacted. Shri Mittal tried to meet this contention by submitting that if the contention of the other side is accepted then "election from a constituency" has to be imported to section 81(1) of the Act which is not permissible.

Before considering the rival contentions, it is necessary to quote the relevant portion of section 81(1) of the Act.

> "81(1) an election petition.....may be presented..... within forty-five days from..... the date of election of the returned candidate or if there are more than one returned candidate at the election and dates of their election are different the later of those two dates."

The above underlined portion i.e. the later part of section 81(1) of the Act came to be inserted by Act 27 of 1956. Prior to such insertion, section 81 (1) in the principal Act, so far as relevant, was as follows:-

> "81(1) .....in such form and within such time but not earlier than the date of publication of the name or names of the returned candidate or candidates at such election under section 67, as may be prescribed."

The aforesaid provision in the principal Act would go to show that previously an election petition was to be filed within the prescribed time from the date of publication of the name or names of the returned candidate or candidates at such election under section 67. It means that the time prescribed for filing election petition was to run from the date of publication of the name or names of the returned candidate or candidates in the Official Gazette under section 67.

9. As already observed, the later part to section 81(1) and section 67A were inserted by Act 27 of 1956. The effect of insertion of the later part to section 81 (1) and section 67A has to be examined in the following background. Election has been defined to mean (vide section 2(d) of the Act) an election to fill a seat or seats in either House of Parliament or in the House or either House of the Legislature of a State. Sub. section 2 of section 2 of the Act further says:

> "2(2). For the purposes of this Act, a Parliamentary constituency, an Assembly constituency, a Council constituency, a local authorities' Constituency, a graduates' constituency and a' teachers' constituency shall each be treated as a constituency of a different class."

From the above, it may be seen that each Assembly constituency has to be treated as a separate constituency. Similarly each Parliamentary or a Council constituency shall be treated as separate constituency of a different class. It is not in dispute that the Act is a self-contained Code which provides for the conduct of elections to the Houses of Parliament and to the House or Houses of the Legislature of each State. The Act deals with the procedure for election to the House of People (Lok Sabha) and Council of States (Rajya Sabha) and the State Legislative Assemblies and State Legislative Councils, if any. As provided under Article 80(4)of the Constitution of India, the elected members of the Legislative Assembly of the State are to elect the representatives of their State in the Council of States by the system of proportional representation by means of the single transferable

vote. Under Article 171 of the Constitution of India the total number of members of the Legislative Council of a State shall consist of one-third to be elected by electorates from local authorities like municipalities etc.,one-twelfth to be elected by electorates from graduate constituencies, one-twelfth from teachers' constituencies, one-third to be elected by the members of the Legislative Assembly from amongst persons who are not members of the Assembly. On the contrary, members of the House of People (Lok Sabha) and the Legislative Assemblies are chosen by direct election. Sub-section 3 of section 4 and sub-section 2 of section 7 of the Representation of the People Act, 1950 respectively lay down that every Parliamentary constituency and every Assembly constituency shall be a single-member constituency. Section 81 of the Act is the provision which exclusively deals with filing of election petitions calling in question any election held by either of the two systems referred to above (proportional representation by means of a single transferable vote or direct election). From the above analysis of the different provisions, I am of the opinion that under section 81(1) of the Act one election petition calling in question of a returned candidate from one constituency is envisaged. It was suggested by Shri Mittal that there could be no such constituency which may have more than one returned candidate at any election. I have not been able to accept the above suggestion. Part VI and Part VII of the Conduct of Election Rules, 1961 respectively deal with voting at elections and counting of votes of elections by Assembly members and or in Council constituencies. Rule 70 of Part VI provides the rules for conduct of poll and method of voting. It says *inter alia* that every elector has only one vote at an election irrespective of the number of seats to be filled. The elector has to mark preferences against the names of the candidates for whom he wishes to cast his vote. This system of voting is known as proportional representation by means of the single transferable vote.The method of counting provided in Part VII of the aforesaid Conduct of Election Rules, 1961 would show that if there are more than one seat to be filled up the counting process may not end in one day and may spread for succeeding days depending upon the ascertainment of quota. It is a time-taking process and therefore the Returning Officer may have to declare results of the returned candidates on two different dates. For the reasons mentioned above, I am inclined to hold that to meet such cases, the following expression i.e. "if there are more than one returned candidate at the election and dates of their election are different the later of those two dates" has been engrafted in the latter part of section 81 (1) of the Act.Therefore, if there is only one returned candidate from one constituency as in an election from a Parliamentary constituency or an Assembly constituency the period of limitation shall begin to run from the date of election of the said returned candidate in that constituency as declared by the Returning Officer. In a case if there are more than one returned candidate at the election e.g. an election to the Council of States or to the State Legislative Council from a Council constituency and the dates of their elections are different the later of those two dates shall be the starting point for computing the period of limitation for such constituency.

10. So far as the cases at hand are concerned, there were no different dates of election for different returned candidates for the same election because admittedly there was only one returned candidate in one election from one constituency and the time from which the period of forty-five days began to run was the date of election of the returned candidate as declared by the Returning Officer.

11. Exception was taken on behalf of the petitioner with regard to the issuance of Form, 21 E (annexure R2) by the Returning Officer on 26.4.2004. The declaration under the said Form 21 E is required to be made in a case coming under Rule 64 of the Conduct of Election Rules, 1961. The said Form has no relevancy to the cases coming under "uncontested elections" (vide section 53 of the Act

read with Rule 11 (11 of the Conduct of Election Rules, 1961.) Issuance of such declaration in Form 21 E is nothing but a surplusage. Since the returned candidates in all the three election petitions were declared elected uncontested what was necessary by the Returning Officer was to issue Form no. 21 which he had duly done on 26.4.2004.

12. By referring to the letter dated 28.4.2004 of the Chief Electoral Officer, Sikkim addressed to the President of Sikkim Pradesh Congress Committee (annexure p/I) Shri Mittal submitted that the Chief Electoral Officer was of the view that until the process of election was over no election petition could be filed. The said letter is of little assistance to the petitioners' *inasmuch* as the law of limitation does not depend upon the view of a particular officer. Section 81(1) of the Act prescribes the starting point for counting the period of limitation. It applies proprio vigore. The question of limitation has to be decided by the provisions mentioned in the statute. The officer's opinion if any may be urged as a ground for condoning delay but in view of the settled position of law that section 5 of the Limitation Act, 1963 is
not applicable for filing of an election petition, the contents of the said letter are of little avail. Section 86(1) of the Act in unequivocal terms declares that the High Court shall dismiss an election petition which does not comply with the provisions of sections 81 or 82 or 117. The provision is peremptory in nature. The above election petitions do not comply with the provision of section 81 (1) of the Act: *inasmuch* as they were not filed within the prescribed period of limitation. Therefore they are liable to be dismissed being barred by time.

13. In the result, the election petitions are dismissed on the point of limitation with costs assessed at *Rs.4,000/-* each. The petitioners have deposited *Rs.2,000/-* each as security for costs. The respondents are entitled to withdraw this amount of *Rs.2,000/-* each towards part of the costs. The petitioners are hereby directed to deposit the balance amount of Rs.2,000/ - each in the Registry within thirty days hence with liberty to the respondents to withdraw the same.

(R. K. Patra)
Chief Justice
18.11.2004

(T.T. DORJI)IAS
Chief Electoral Officer
Sikkim -Gangtok.

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